86-54

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

SHAKIR WADI AL-KHAFAJI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

IS 18 U.S.C. §922(e) UNCONSTITUTIONAL AS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, ESPECIALLY IN LIGHT OF THE SIXTH CIRCUIT RULING THAT THE STATUTE DOES NOT REQUIRE SPECIFIC INTENT AND IMPOSES NO NECESSARY ELEMENT OF SCIENTER OR MENS REA?

DID THE TRIAL COURT AND SIXTH CIRCUIT COMMIT ERROR WHEN THEY FAILED TO READ IN A REQUIREMENT OF SPECIFIC INTENT AS TO 18 U.S.C. §922(e) AND WHAT WAS THE PROPER UTILIZATION OF THE RULE OF LENITY?

II.

WAS THE PETITIONER DEPRIVED OF A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL COURT PRECLUDED DEFENSE COUNSEL IN SUMMATION BEFORE THE JURY FROM ARGUING THE FACT THAT THE GOVERNMENT HAD NOT CALLED A CERTAIN GOVERNMENTAL AGENT TO REBUT PETITIONER TESTIMONY THAT HE HAD RELIED ON THAT GOVERNMENT AGENTS' INFORMATION AS TO THE ACTIONS OF THE PETITIONER THAT RESULTED IN HIS BEING INDICTED? DID SUCH PROHIBITION BY THE TRIAL COURT ERRONEOUSLY PRECLUDE COUNSEL FROM PARTICIPATING FULLY AND FAIRLY IN THE ADVERSARY FACT FINDING PROCESS?

LIST OF PARTIES

The parties in this proceeding in the United States District Court of Appeals were as follows:

1. SHAKIR WADI AL-KHAFAJI, Defendant-Appellant.

2. UNITED STATES OF AMERICA, Plaintiff-Appellee.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SHAKIR WADI AL-KHAFAJI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Shakir Wadi Al-Khafaji, by his attorney, Richard Paul Zipser, prays that a Writ of Certiorari issue to review the Judgment heretofore entered against him by the United States Court of Appeals for the Sixth Circuit filed on March 24, 1986 and further denied by petition for rehearing en banc on May 2, 1986.

OPINIONS AND ORDERS BELOW

The Judgment and Commitment Order of the United States District Court for the Eastern District of Michigan, Southern Division, is unreported. There is no written opinion of the United States District Court of Michigan, Southern Division.

The Opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is set forth in Appendix B herein. The Order Denying Petitioner's Motion for a Hearing En Banc is set forth in Appendix C herein.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 24, 1986. An Order denying a Petition for Rehearing En Banc was entered on May 2, 1986 by the United States Court of Appeals for the Sixth Circuit. The time for filing a Petition for Writ of Certiorari

continues to July 1, 1986. The jurisdiction of the Court is invoked under Title 28, U.S.C. §1254(1).

STATEMENT OF THE CASE

Shakir Wadi Al-Khafaji was indicted by a Grand Jury in the Eastern District of Michigan, Southern Division. He was charged in the Indictment with two separate and distinct counts. Count One charges that on October 21, 1982, Mr. Al-Khafaji violated 22 U.S.C. §2778, more formally referred to as the Munitions Control and Neutrality Act. Count Two of the Indictment charged Mr. Al-Khafaji with having violated 18 U.S.C. §922(e) and §924(a), more formally referred to as Delivery of Firearms to a Common Carrier Without Notice. On May 18, 1983, a jury acquitted Mr. Al-Khafaji of the charge contained in Count One and found him guilty

with respect to Count Two, namely, the Delivery of Firearms to a Common Carrier without Notice.

Al-Khafaji was a permanent resident of the United States at the time of his trial. He was twenty seven years of age and had attended two universities in the United States and had earned degrees in architecture and a Master Degree in urban planning.

On October 21, 1982, Al-Khafaji purchased a ticket from Pan American Airlines for a flight to Iraq that departed from Detroit Metropolitan Airport to New York City and then on to London, England, with the final destination and arrival in the Country of Iraq. Three hours prior to his scheduled departure from Detroit Metropolitan Airport, he delivered two suitcases and a number of boxes to two Pan American employees who received the baggage from him and helped him check it in.

Three Customs agents were at the airport the day of Al-Khafaji's departure claiming they had received a tip with respect to exporting weapons from Detroit Metropolitan Airport. These agents went to the Pan American baggage area and retrieved Al-Khafaji's checked baggage. They then conducted a search of the luggage and discovered eight handguns and three shotguns. There was no ammunition found either in the guns or in the accompanying luggage. The agents arrested Mr. Al-Khafaji while he was in the process of boarding the airplane. When he was arrested, they took from Al-Khafaji a briefcase containing documents.

Al-Khafaji maintains, as he did in his trial, that he contacted several Government Agencies and airline companies to inquire about the legality of exporting weapons. Al-Khafaji testified at trial. He contacted the Bureau of Alcohol, Tobacco, and Firearms,

the United States Custom Service and British airways. He further testified that he was informed by individuals of these entities that there were no regulations governing or restricting the exportation of weapons. He was advised to contact his own consulate or his Government. Central to Al-Khafaji's defense during the course of his trial was that the Government should be estopped from prosecuting him since Government agents with proper authority informed him that his contemplated actions were not illegal.

Al-Khafaji admitted at his trial that he packed, what he referred to as gift handguns and shotguns and presented them on October 21, 1982 to the operator of the baggage shipment section of Pan American airlines, a Mr. Bodiya. He spoke to a Ms. Lewis of the United States Customs and was informed that there were no regulations. It was his testimony that he informed Ms. Lewis that he

was taking hunting guns and handguns to Iraq as gifts. He was referred by Ms. Lewis to Alcohol, Tobacco, and Firearms to make inquiry of that agency.

Al-Khafaji contacted a Mr. Woodburn from Alcohol, Tobacco, and Firearms. Again, he was told there were no regulations involved since he was taking articles out of the country and was advised to call his consulate. Mr. Woodburn, was informed by Al-Khafaji that he would be traveling by airplane. Al-Khafaji then related in his testimony that he drove to Detroit Metropolitan Airport to determine taxes that he would have to pay with respect to any Customs duties. He went to the international terminal and was referred to the Customs office. He told Customs office employees that he was planning to take articles to Iraq. He expressed that he was taking handguns and hunting guns to Iraq and was

referred to an employee of Customs, one Mr. Glotfelty. The information given to him by Mr. Glotflety allowed the taking of three hunting guns. Mr. Glotfelty referred him to Customs main office with respect to handguns. The address and phone number necessary for Customs was written by Mr. Glotfelty. During the trial, Mr. Glotfelty's handwriting was identified on an Exhibit, admitted into evidence, verifying that Al-Khafaji had gone to the airport and had a conversation concerning weapons with Mr. Glotfelty. Al-Khafaji went on to testify during the trial that he had contacted the phone number given to him by Mr. Glotfelty and talked to a person by the name of Anderson. Mr. Anderson referred him to the Bureau of Alcohol, Tobacco, and Firearms to which Al-Khafaji responded he had already contacted Alcohol, Tobacco, and Firearms. Al-Khafaji then called Alcohol, Tobacco, and Firearms and

spoke with a Mr. Kleckley and related that he was informed that there were no regulations for people who were taking weapons out of the country under the jurisdiction of Alcohol, Tobacco, and Firearms. He again was advised to contact his consulate in Washington, D.C. to see if that Government had any difficulty with it. When Al-Khafaji was arrested at Detroit Metropolitan Airport, he had Mr. Glotfelty's card in his briefcase.

The Government called Customs Inspector, Ms. Lewis, and Customs Inspector, James Glotfelty in rebuttal of the Al-Khafaji testimony with regard to the reliance defense. Ms. Lewis recalled a conversation concerning hunting weapons, but could not recall Al-Khafaji's name. She not did recall handguns being mentioned in the conversation. An Alcohol, Tobacco, and Firearms inspector testified that he would advise a non-American citizen taking firearms to another country to

contact his consulate or his Government. Customs Inspector Glotfelty testified that he did meet Al-Khafaji on approximately October 5, 1982. He informed Al-Khafaji he could export three long guns without an export license. He advised that handguns were treated differently. However, a statement prepared by Glotfelty after Al-Khafaji's arraignment and arrest had no mention that Al-Khafaji was advised of the necessity for a license to export handguns. Glotfelty testified that this omission in his report was unintentional on Glotfelty's part and that Al-Khafaji represented he was intending to export shotguns, not handguns. He further testified that he never advised Al-Khafaji that a written notice to the airline was necessary in order to take firearms on an airplane.

There was no ammunition contained in any of the baggage of Al-Khafaji. Nor were any handguns or hunting shotguns brought into the passenger area of the airplane by Al-Khafaji. The handguns were of gift quality. They were surrendered up to the baggage operator for Pan American Airlines and to be placed in the baggage compartment of the airplane that affords no access to the passengers, let alone Al-Khafaji.

When Al-Khafaji presented his luggage to Mr. Bodiya in the baggage area of the Pan American ticket counter, Mr. Bodiya stated clearly at trial, that there were no signs posted in the immediate area informing travelers that they should submit their written statement declaring the presence of firearms in their luggage. He testified that a few weeks later such signs were put up in the area and that this was after the incident involving Al-Khafaji. It was admitted at the

time that Mr. Al-Khafaji passed through the security gate, he had already checked all of his baggage in the aforementioned area where no signs were posted.

Both the Government and defense had issued a Subpeona for Alcohol, Tobacco, and Firearms Agent Woodburn. Woodburn ceased working for Alcohol, Tobacco, and Firearms prior to trial. He did not appear at the trial. Defense wanted to argue to the jury that Woodburn's absence failed to rebut the testimony of Al-Khafaji. After concluding that the Defendant had not exhausted every reasonable effort to located Woodburn, the Court precluded reference to Woodburn's absence as creating an inference favorable to the Defendant or the Government. The Court further precluded defendant's counsel from arguing that the absence would suggest his testimony would be favorable to Al-Khafaji.

Subsequent to the jury finding Al-Khafaji guilty of Count Two, a Motion was filed for Judgment Notwithstanding the Verdict, which the trial court treated as a Motion for Acquittal, pursuant to Federal Rule of Criminal Procedure 29(c). It was argued that the prosecution was barred by the Fifth Amendment's protection against self-incrimination. The trial court granted the Motion, however the Sixth Circuit reversed and remanded for entry of judgment in accordance with the jury's verdict. See United States v. Al-Khafaji, 754 F.2d 641 (6th Cir. 1985). The Defendant was sentenced to serve fourteen months in prison. On appeal, Al-Khafaji raised several assignments of error.

On March 24, 1986, the United States Court of Appeals for the Sixth Circuit affirmed the conviction of Al-Khafaji as to Count Two. A Petition for Rehearing En Banc was denied as well. (App. C)

REASONS FOR ALLOWANCE OF THE WRIT

I.

THE COURT OF APPEALS ERRONEOUSLY DECIDED THAT 18 U.S.C. §922(e) HAS NO REQUIREMENT OF SPECIFIC INTENT WITH RESPECT TO SCIENTER-MENS REA-GUILTY KNOWLEDGE AS A NECESSARY ELEMENT TO BE PROVEN BEYOND A REASONABLE DOUBT IN ORDER TO BE CONVICTED OF THE OFFENSE.

Such an interpretation violates the Due Process Clause of the Fifth Amendment to the United States Constitution. It imposes a serious penalty of incarceration, a felony conviction, and injures the reputation of those convicted under such statute. The Sixth's Circuit's interpretation is contrary to the general rule, well established, that criminal statutes require mens-rea responsibility. Since 18 U.S.C. 922(e) was

not a crime known at common law, the absence or silence as to a requirement of specific intent cannot be remedied by the Court's reading the requirements into the statute. The rule of lenity, allows the reading of specific intent only if the legislative purpose is unclear with respect to the statute. Review and allowance of this Writ of Certiorari is required as the statute has never received constitutional interpretation by the United States Supreme Court. Al-Khafaji stands convicted of either a statute that is unconstitutional or convicted where the jury was improperly instructed that specific intent-scienter-mens rea-guilty knowledge was not required.

The unreported opinion of the Court of Appeals in the instant matter first addressed Al-Khafaji's argument that the Due Process Clause mandates specific intent, an element of 18 U.S.C. §922(e). The Sixth Circuit

noted that original trial counsel had not raised the issue. They felt compelled to follow the plain error standard of review. They focused on whether or not the error resulting in a miscarriage of justice. However, the Court went on to consider the Due Process issue and addressed the issue as to the requirement of specific intent as an element of 18 U.S.C. §922(e). The Court specifically held that it did not believe the Due Process Clause mandated such a result. It relied erroneously on an inappropriate interpretation of United States v. Freed, 401 U.S. 601, 609-10 (1971). There was no disagreement that the United States District Court's instruction with respect to 18 U.S.C. 922(e) left out any requirement of the presence of scienter. The opinion of the Sixth Circuit relied largely on the case of United States v. Udofot, 711 F.2d 381 (8th Cir.); cert. denied, 464 U.S. 896 (1983).

The reliance on United States v. Freed, supra, is misplaced. In fact, in an earlier case, decided by the Sixth Circuit, the meaning of United States v. Freed with respect to mens-rea requirements was well explained. In United States v. Renner, 496 F.2d 922 (6th Cir. 1974), a firearms case, the trial court had instructed the jury that the statute did not specifically require knowledge. The statute involved was 18 U.S.C. 922(h)(1). The instruction in Renner was uniquely similar to the instruction in the instant matter. Yet, the Sixth Circuit reversed the conviction of Renner and in doing so, went on to comment upon case law relied upon in the instant matter seeking allowance of the Writ that supports Al-Khafaji's contention.

> The instruction to be determined on this Appeal is whether scienter is an element of defense stated in 18 U.S.C. §922(h)(1)... The Act itself does not specifically require knowledge that an Indictment is

> pending. If such a requirement is to be imposed, it must be based on the long established requirement of criminal responsibility, namely mens-rea. Morissette v. United States, 342 U.S. 246 (1952)...We must also consider the decision of the Supreme Court in United States v. Freed, in which it was stated that a number of exceptions to the general rule that one must have mens-rea to be convicted of a crime has increase over the years. 496 F.2d at 924.

In Renner, supra, the Sixth Circuit went on to analyze United States v. Freed. The Freed decision involved a highly dangerous substance, namely a hand grenade. It involved an entirely different statute. In the instant matter, no such highly dangerous substance was involved, but uniquely fell upon circumstances where Al-Khafaji had given unloaded firearms, a small amount in number, accompanied by no ammunition, and shipped completely apart from passenger access on Pan American Airlines. The Sixth Circuit earlier had delineated the distinction in the case

law relied upon in the instant matter in erroneously reaching a decision contrary to it's position in United States v. Renner.

Renner stands for the proposition that the principles in United States v. Morissette, supra, with regards to mens-rea are applicable in the present action. Further, the Petitioner, Al-Khafaji is correct and that the Sixth Circuit erroneously decided the question and that it is inconsistent with the determination in Freed. Freed did not prescribe a broad rule that specific intent or knowledge is not an element of a crime for prosecutions for illegal possession of firearms. United States v. Renner, 496 F.2d at 922. See also, Lambert v. California, 355 U.S. 225 (1957), United States v. Dotterweich, 320 U.S. 277 (1943).

The trial court instructed the jury that 18 U.S.C. 922(e) was not a crime that required a knowing specific intent in order to be found guilty. The instruction did away with the mens-rea-scienter-guilty knowledge requirement. The erroneous decision of the Sixth Circuit requires a review of this Court and the granting of the Writ. See United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985); Liparota v. United States, __ U.S. __, 105 S. Ct. 2084 (1985). Certainly 18 U.S.C. 922(e) is not a criminal statute where the penalty on conviction is relatively small. It carries a substantial prison sentence and injures the reputation of one charged and convicted of such an offense. See Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960).

Recently, in Liparota v. United States, supra, the Supreme Court held that in a prosecution for using or acquiring food

stamps in any manner not authorized by statute or regulation, the Government must prove that the Defendant knew his acquisition or possession of the illegal instrumentality was in a manner unauthorized by statute or regulation. The Court further ruled that the failure of Congress explicitly and unambiguously to indicate whether mens-rea was required did not mean that Congress had dispensed with the mens-rea requirement. In short, the principle is that the Government is required to prove that the Defendant had knowledge and that his possession or acquisition is in a manner unauthorized by statute or regulation. Criminal offenses requiring no mens-rea have a generally disfavored status. To interpret the statute to dispense with mens-rea is to criminalize a broad range of apparently innocent conduct. In Liparota, the Supreme Court went further to state that requiring mens-rea in the

instant matter is in keeping with the established principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. See, also, United States v. Pollard, 724 F.2d 1438 (6th Cir. 1984).

It is respectfully prayed by the Petitioner that this reason is substantial and appropriate for the allowance for the Writ of Certiorari.

II.

THE COURT OF APPEALS ERRONEOUSLY DECIDED THAT THE TRIAL COURT HAD ACTED PROPERLY WHEN IT HAD ORDERED THAT DEFENSE COUNSEL COULD NOT REFER TO THE ABSENCE OF AGENT WOODBURN AS BEARING ON THE FAILURE OF THE GOVERNMENT TO CONTROVERT APPELLANT'S TESTIMONY WITH RESPECT TO HIS DEFENSE OF RELIANCE AND ESTOPPEL.

The Sixth Circuit failed to decide the entire issue relating to Agent Woodburn. The issue on appeal was not solely one of being able to argue an inference by the Government's failure to produce retired Agent Woodburn as favorable to Al-Khafaji. Al-

Khafaji had also argued before the Court of Appeals that the Trial Court's Order was a blanket prohibition. It precluded as part of defense's summation to the jury that Woodburn had not been produced by the Government, and that while no inference could be instructed on by the trial court as to this failure to produce Woodburn, it certainly was something that the jury should have been allowed to consider. It was important and permissible closing argument. It was important to argue the Government failed to controvert Al-Khafaji's testimony as to his reliance on Woodburn's representation. Such action by the Sixth Circuit is contrary to the guarantees of the Sixth Amendment's right to effective assistance of counsel and violated the appellant's right to a fair trial under the Due Process Clause of the Fifth Amendment of the United States Constitution.

Exercising tight control over closing arguments is undesirable, when it precludes counsel from raising significant issues. United States v. Mahone, 537 F. 2d 922 (7th Cir. 1976). The trial court prohibited defense counsel at the very least from arguing on behalf of Mr. Al-Khafaji to the jury as to the significance of the missing witness Woodburn. The Sixth Circuit and the trial court failed to realize that there is a difference between denying an instruction (which has the weight of law, and perhaps arguendo the Court had no duty to give with respect to an inference on a missing witness instruction) then argument of counsel. While, as in this case, it concluded that each side had the physical capacity to locate and produce a witness, the Court must allow latitude with respect to leaving the matter for debate without instruction. The Court should have permitted each counsel to argue

to the jury concerning the natural inference of the fact to be drawn. With respect to the defense of Al-Khafaji, it would have went directly to the heart of why his attorney argued he should be acquitted of 18 U.S.C. 922(e). The trial court had allowed that estoppel and/or reliance was a defense to Count Two. See United States v. Young, 463 F.2d 934 (D.C. Cir. 1972).

The Sixth Circuit erred when it did not even address this aspect of the issue. Instead, the Sixth Circuit failed to distinguish, as argued by Al-Khafaji, that there were at least two significant issues relating to the missing witness Woodburn. One issue was a request of the Court for an instruction that carried the weight of the Court itself, telling the jury that it must infer something favorable to Al-Khafaji. The second issue was that counsel for Al-Khafaji would have the right at least to argue, to

the jury, that Al-Khafaji's testimony concerning the Agent Woodburn's words upon which he relied was never rebutted by the presentation of Agent Woodburn. Yet, the trial court distinctly precluded counsel, from making such an argument.

A defense counsel's arguing and summarizing to the jury in relationship of Agent Woodburn and the Al-Khafaji's reliance defense goes to the heart of the protections guaranteed to the Petitioner by the Sixth Amendment of the United States Constitution. The actions by the trial court and the decision of the Sixth Circuit erroneously precludes counsel from participating fully and fairly in the adversary fact finding process. See also, Herring v. New York, 422 U.S. 853 (1975); United States v. Walls, 443 F.2d 1220 (6th Cir. 1971); Patti v. Bordenkircher, 603 F.2d 587 (6th Cir. 1979).

Substantial reasons have been presented to this Court for the granting of a Writ of Certiorari with respect to this issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that the Petition for Writ of Certiorari be granted, or in the alternative, that the Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming Petitioners' convictions be summarily reversed, or in the alternative, that the matter be remanded for the Sixth Circuit to determine more fully the issues amplified upon review of this Court.

Respectfully submitted,

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DATED: June 26, 1986

APPENDICES

APPENDICES

APPENDIX A

TEXT OF STATUTE INVOLVED

18 United States Code §922(e)

It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter.

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SHAKIR WADI AL-KHAFAJI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Decided and Filed on March 24, 1986

Before: KENNEDY and CONTIE, Circuit Judges; and GIBSON, District Judge.*

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* The Honorable Benjamin F. Gibson, United States District Judge for the Western District of Michigan, sitting by designation.

PER CURIAM. Appellant Al-Khafaji appeals his jury conviction on one count of delivering firearms to a common carrier without notice in violation of 18 U.S.C. §922(e).

I.

On October 21, 1982 appellant, who had purchased a ticket from Pan Am Airlines to fly to Iraq from Detroit via New York and London, arrived at Detroit Metropolitan Airport to check his baggage. He arrived approximately three hours before his scheduled departure time with two suitcases and a number of boxes. Two Pan Am employees received the baggage from appellant and helped him check it in.

Sometime prior to that date the United States Customs Service had received a tip that appellant would be exporting weapons from Detroit Metropolitan Airport in his

checked baggage. Three Customs agents were at the airport the day of Al-Khafaji's departure. They went to Pan Am's checked baggage area and retrieved appellant's checked luggage.

The agents then conducted a search of appellant's luggage and discovered eight handguns and three shotguns. When the appellant returned to the ticket area, one of the Pan Am employees identified him to the agents. The agents arrested the appellant while he was in the process of boarding the plane. The agents also appropriated from the defendant a briefcase containing documents relating to gun transactions and a list of weapons.

On November 18, 1982 appellant was charged in a two count indictment with illegally attempting to export firearms in

violation of 22 U.S.C. §2278, and delivering firearms to a common carrier without notice in violation of 18 U.S.C. §922(e).[1] At the jury trial, which commenced on May 12, 1983, the government elicited testimony from gun

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[1] Section 922 provides:

> It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor, or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter.

dealers and other individuals concerning gun purchase transactions with, or for, the appellant.

The appellant contends that he contacted the Bureau of Alcohol, Tobacco and Firearms (ATF), the United States Customs Service (Customs) and British Airways to inquire about the legality of exporting weapons. He argues that he was informed by individuals at these agencies that there were no regulations governing or restricting the exportation of weapons, and that he was advised to contact his consulate or his government. Appellant's main defense was that the government should be estopped from prosecuting him since government agents with proper authority informed him that his contemplated actions were not illegal.

In rebuttal the government called Ms. Francis Lewis, a Customs Inspector, who testified that she occasionally received calls requesting information with respect to the exportation of weapons. She testified that she recalled a conversation concerning hunting weapons, did not recall the appellant's name, and did not recall handguns being mentioned in the conversation.

An ATF inspector testified that he could not remember specific phone calls, but that he would advise a non-American citizen taking firearms to another country to contact his consulate or his government. A Customs Inspector, James Glotfelty, testified at trial that he told the appellant, on approximately October 5, 1982, that he could export three long guns without an export license but that handguns were treated differently and appellant would need a

license to export handguns. This inspector's business card was found in the appellant's briefcase when he was arrested.

A statement prepared by Glotfelty after appellant's arraignment did not mention that appellant was advised of the necessity for a license to export handguns. Although it did state that handguns were treated differently, Glotfelty testified that this omission was unintentional, and that Al-Khafaji represented that he was intending to export shotguns, not handguns. Glotfelty testified that he did not advise appellant that written notice to the airline was necessary in order to take firearms on the plane.

Appellant testified that he relied on advice and actions of an ATF agent, Woodburn, who stated that ATF had no regulations concerning weapons going out of the country, and that appellant should contact his

consulate. Both sides issued subpeonas for Woodburn, who had ceased working for ATF, but he did not appear at the trial. The defense wanted to argue that the jury was free to infer that Woodburn's absence suggested that his testimony would be favorable to Al-Khafaji. After concluding that the defendant had not exhausted every reasonable effort to locate Woodburn, the court precluded reference to Woodburn's absence as creating an inference favorable to the defendant or the government.

The jury found appellant not guilty of violating 22 U.S.C. §2278 but guilty of violating 18 U.S.C. §922(e). Subsequently, appellant filed a Motion for Judgment Notwithstanding the Verdict which the trial court treated as a Motion for Acquittal pursuant to Federal Rule of Criminal Procedure 29(c). He argued that his

prosecution was barred by the fifth amendment's protection against self-incrimination. Although the trial court granted this motion, this court reversed and remanded for entry of judgment in accordance with the jury's verdict. See United States vs. Alkhafaji, 754 F.2d 641 (6th Cir. 1985). Appellant was sentenced to serve fourteen months in prison. On appeal, the defendant raises several assignments of error.

II.

Only one of the appellant's assignments of error was raised at the trial court level. Therefore, the other assignments of error are subject only to a "plain error" standard of review. Fed. R. Crim. P. 52(b). To constitute plain error, the error must be both obvious and substantial. United States v. Smith, 700 F.2d 627 (11th Cir. 1983). It must be so plain as to mandate review, and

substantial in that the error resulted in a miscarriage of justice. United States v. Lopez, 575 F.2d 681 (9th Cir. 1978); United States v. Anderson, 654 F.2d 1264 (8th Cir.), cert. denied, 454 U.S. 1127 (1981).

The Defendant argues that the due process clause mandates that specific intent be an element of 18 U.S.C. §922(e). We do not believe that the due process clause mandates such a result, see, e.g., United States v. Freed, 401 U.S. 601, 609-10 (1971), and hold that the district court's construction with respect to scienter did not rise to a level of plain error. We similarly conclude that specific intent is, in fact, not a requirement of section 922(e). United States v. Udofot, 711 F.2d 831, 836 (8th Cir.), cert. denied, 464 U.S. 896 (1983).

The defendant asserts that he was convicted of a crime not alleged in the indictment since the indictment did not allege that the weapons were being shipped to an unlicensed person. However, the weapons were in his accompanying baggage, and returning baggage to a passenger who is not a licensed importer, manufacturer, dealer, or collector can satisfy the requirement in section 922(e). See, e.g., Udofot, 711 F.2d 831 (8th Cir. 1983); United States v. Williams, 485 F.2d 1383 (4th Cir. 1973), cert. denied, 416 U.S. 941 (1974); United States v. Burton, 351 F. Supp. 1372 (W.D. Mo. 1972), aff'd, 475 F.2d 469 (8th Cir.), cert. denied, 414 U.S. 835 (1973). Therefore, the defendant was not convicted of a crime not charged in the indictment.

The defendant argues that the evidence does not support a finding that he violated section 922(e), invoking the "pilot delivery" exception to the statute. However, we are unwilling to hold that mere delivery to the airline baggage officer of luggage containing the firearms satisfies the actual notice requirement of section 922(e). See Udofot, 711 F.2d 831 (8th Cir. 1983); United States v. One Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1980); United States v. Burton, 351 F. Supp. 1372 (W.D. Mo. 1972), aff'd, 475 F.2d 469 (8th Cir.), cert. denied, 414 U.S. 835 (1973). Therefore, appellant's conviction cannot be overturned on this ground.

The defendant next argues that section 922(e) is unconstitutionally vague in that the word "operator" is not sufficiently defined. We disagree. Udofot, 711 F.2d at

840-41. Moreover, the defendant did not provide notice to any airline official that he was checking baggage containing firearms.

The defendant also objects to a portion of the court's jury instructions regarding burden of proof. We have reviewed the court's instructions and conclude that even if the court erred, these instructions did not rise to the level of plain error.

The only assignment of error raised by the defendant at trial relates to the district court's decision to preclude reference to former ATF agent Woodburn's absence as raising an inference favorable to either party. We believe that the district court's reasoning is persuasive. Since the defendant did not exhaust every reasonable means to locate Woodburn, such an inference in favor of the defendant could not be supported. Since this witness was not within

the peculiar power of the government, see United States v. Blakemore, 489 F.2d 193 (6th Cir. 1973), such a ruling was within the trial court's discretion. United States v. Sutton, 732 F.2d 1483, 1492 (10th Cir. 1984), cert. denied, 105 S. Ct. 903 (1985); United States v. Bramble, 680 F.2d 590, 590 (9th Cir.), cert. denied, 459 U.S. 1072 (1982).

Accordingly, the defendant's conviction is AFFIRMED.

NOTICE: This Opinion was not recommended for full-text publication.

APPENDIX C

ORDER DENYING PETITIONERS' MOTION FOR A HEARING EN BANC

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(Filed May 2, 1986)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

ORDER

v.

SHAKIR WADI AL-KHAFAJI,

Defendant-Appellant.

Before: KENNEDY and CONTIE, Circuit Judges and GIBSON* United States District Judge.

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* Hon. Benjamin F. Gibson sitting by designation from the Western District of Michigan.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk

APPENDIX D

INDICTMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OR MICHIGAN
SOUTHERN DIVISION
(Filed November 19, 1982)

UNITED STATES OF AMERICA,

Plaintiff, HON: Patricia Boyle
CRIMINAL NO. 82-80523

v.

SHAKIR WADI ALKHAFAJI,
a/k/a S. Wadi,

Defendant.

I N D I C T M E N T

THE GRAND JURY CHARGES:

COUNT ONE

22 U.S.C. §2778 - VIOLATION OF
MUNITIONS CONTROL AND NEUTRALITY ACT

That on or about October 21, 1982, at the Detroit Metropolitan Airport in the Eastern District of Michigan, Southern

Division SHAKIR WADI ALKHAFAJI, a/k/a S. Wadi, defendant herein, did knowingly and unlawfully attempt to export defense articles and munitions of war as defined in 22 C.F.R. §§121.01, 121.03, 121.04, and 121.05, to wit: eight handguns described as follows:

1. Smith & Wesson model 439, 9mm nickel plated semi-automatic pistol, serial number A748361.

2. Browning model "Highpower", 9mm stainless finish semi-automatic pistol, serial number 245PZ280820.

3. Smith & Wesson model 59, 9mm nickel plated semi-automatic pistol, serial number A709304.

4. Smith & Wesson model 39, 9mm nickel plated semi-automatic pistol, serial number A445575.

5. Smith & Wesson model 39, 9mm nickel plated semi-automatic pistol, serial number A567021.

6. AMT model "Backup", .380 stainless finish semi-automatic pistol, serial number A32288.

7. AMT model "Backup", .380 stainless finish semi-automatic pistol, serial number A32294.

8. Smith & Wesson model 19-5 .357 nickel plated 4" barrel 6 shot revolver, serial number 168K412.

without having obtained an export license to do so from the Secretary of State; in violation of Section 2778 of Title 22, United States Code.

COUNT TWO

18 U.S.C. §922(e) & 924(a) - DELIVERY OF FIREARMS TO A COMMON CARRIER WITHOUT NOTICE

That on or about October 21, 1982, at the Detroit Metropolitan Airport in the Eastern District of Michigan, Southern Division SHAKIR WADI ALKHAFAJI, a/k/a S. Wadi, defendant herein, did knowingly deliver and cause to be delivered to a common carrier, this is Pan American Airlines, for transportation and shipment in interstate and foreign commerce, from Detroit, Michigan, through London, England, to Baghdad, Iraq, as accompanying baggage of S. Wadi, a person who

was not a licensed importer, manufacturer, dealer or collector of firearms or ammunition under the provisions of Title 18 United States Code, Chapter 44, eleven firearms contained in two blue suitcases and described as follows:

1. Smith & Wesson model 439, 9mm nickel plated semi-automatic pistol, serial number A748361.

2. Browning model "Highpower", 9 mm stainless finish semi-automatic pistol, serial number 245PZ280820.

3. Smith & Wesson model 59, 9mm nickel plated semi-automatic pistol, serial number A709304.

4. Smith & Wesson model 39, 9mm nickel plated semi-automatic pistol, serial number A445575.

5. Smith & Wesson model 39, 9mm nickel plated semi-automatic pistol, serial number A567021.

6. AMT model "Backup", .380 stainless finish semi-automatic pistol, serial number A32288.

7. AMT model "Backup", .380 stainless finish semi-automatic pistol, serial number A32294.

8. Smith & Wesson model 19-5 .357 nickel plated 4" barrel 6 shot revolver, serial number 168K412.

9. Mossberg model 195, 12 gauge bolt action shotgun, no serial number.

10. Spiegel model 32C, 12 gauge bolt action shotgun, no serial number.

11. Remington model 870, 12 gauge pump shotgun, with folding underneath stock serial number V664327V.

without having first given written notice that such firearms were being transported and shipped, in violation of Section 922(e) and 924(a), Title 18, United States Code.

THIS IS A TRUE BILL.

_____
FOREPERSON

LEONARD R. GILMAN
United States Attorney

VIRGINIA M. MORGAN (P25679)
Assistant United States Attorney

Dated: